Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ADOLPH CARTER,

Petitioner,

v.

GEORGE E. DETELLA, Warden,
Danville Correctional Center,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the test announced in *Brecht v. Abrahamson*, ___ U.S. ___, 113 S. Ct. 1710 (1993), for determining harmless error in habeas corpus proceedings properly applies to error arising from instructions that erroneously prevent the jury from considering constitutionally relevant evidence, such as evidence that the defendant possessed a mitigating mental state that was a defense to murder.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Adolph Carter respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 23, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 36 F.3d 1385 (7th Cir. 1994) and is reprinted in the Appendix at App. 1-22. The relevant opinion of the United States District Court for the Northern District of Illinois is unpublished and is reprinted in the Appendix at App. 28-38.

JURISDICTION

On September 23, 1994, the Seventh Circuit entered its order reversing the decision of the district court. (App. 23). Carter moved for and received an extension of time in which to file a petition for rehearing, and he timely filed a Joint Petition for Rehearing and Suggestion for Rehearing in Banc on October 28, 1994.[1] The Joint Petition for Rehearing was denied on November 30, 1994.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

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[1] Petitioner's appeal was consolidated for argument before the Seventh Circuit with the appeals of four other habeas petitioners raising the same instructional error. The Joint Petition for Rehearing and Suggestion for Rehearing in Banc was filed on behalf of all five habeas petitioners.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V provides in part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. VI provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Carter was convicted of murder and armed violence in the Circuit Court of Cook County, Illinois, in the death of James Bates.

At trial, Giselle Byrd (Bates' girlfriend), John Young, and William Johnson testified for the prosecution. They said that on October 5, 1985, Byrd and Bates were walking on Chicago's near north side when Young pulled alongside them in a car. After a brief conversation, Young offered to give Byrd and Bates a ride to the south side. Byrd got into the car, sat in the front middle seat, and began talking with an acquaintance in the back seat.

As Bates was about to get in next to Byrd, Young and Byrd heard a noise and saw Bates fall to the ground. The three witnesses testified that they saw Carter standing a few feet from Bates holding a baseball bat, and Johnson

said that he saw Carter hit Bates in the head with the bat. Carter then told Byrd to get out of the car, but Byrd did not. As Bates began to stand up, Carter hit him again in the head. Then, Carter left.

Young and Byrd drove Bates to a nearby hospital, where he was treated and released. Bates, however, died in his sleep the next morning. According to the medical examiner, Bates' death was caused by multiple blunt trauma injuries to the head, injuries consistent with being hit in the head more than once with a baseball bat.

Carter testified in his own defense. Carter said that on October 3, 1985, two days earlier, he had been in a fight with Bates and Byrd's brother, Wiley. During the fight, Carter was stabbed in the leg.[2] On October 5, when Byrd approached Carter in a neighborhood store and said she wanted to talk, Carter replied that there was nothing to talk about. Byrd followed Carter out of the store, apologizing for the fight.

As they were talking, Byrd suddenly threw her hands over her face. Frightened, Carter dropped to the ground. Hearing a noise behind him, Carter turned and saw Bates standing about five feet away next to a pole, holding a baseball bat. Carter testified that he thought Bates had tried to hit him with the bat but had hit the pole instead. Fearing death or serious injury, Carter got up, wrestled the bat away from Bates, and hit Bates once on the head with the bat. Carter then fled.

The trial court instructed the jury on the offenses of armed violence, murder, and voluntary manslaughter based on the unreasonable belief of the need for self-defense. The murder instruction stated:

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[2] Byrd agreed that the fight occurred but did not think that Carter had been stabbed.

> To sustain the charge of murder, *the State must prove the following propositions*:
>
> First: That the Defendant performed the acts which caused the death of James Bates; and
>
> Second: That when the Defendant did so, he intended to kill or do great bodily harm to James Bates; or he knew that his acts created a strong probability of death or great bodily harm to James Bates; and
>
> Third: *That the Defendant was not justified in using the force which he used.*
>
> If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the Defendant guilty.
>
> If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the Defendant not guilty.

(emphasis supplied). The instruction for voluntary manslaughter based on an unreasonable belief in the need for self-defense stated:

> To sustain the charge of voluntary manslaughter, *the State must prove the following propositions*:
>
> First: That the Defendant performed the acts which caused the death of James Bates; and
>
> Second: That when the Defendant did so, he intended to kill or do great bodily harm to James Bates; or he knew that his acts created a strong probability of death or great bodily harm to James Bates; and
>
> Third: *That when the Defendant did so, he believed that circumstances existed which would have justified killing James Bates*; and
>
> Fourth: *That the Defendant's belief that such circumstances existed was unreasonable.*

> If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the Defendant guilty.
>
> If, however, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the Defendant not guilty.

(emphasis supplied).

The court gave the jury a guilty and a not guilty verdict form for each of the three charges. The court told the jury that they could only return a guilty verdict for murder or voluntary manslaughter, not both. The court later reinstructed the jury that "if you return a verdict as to the murder, you need not return a verdict on the voluntary manslaughter. Conversely if you return a verdict on the voluntary manslaughter, you need not return a verdict on the murder." During deliberations, the jury asked the court if it was necessary to return a verdict on all three of the charges or just two of them; the court responded that it was not necessary to return a verdict on all three charges.

The jury returned guilty verdicts on murder and armed violence. Carter was sentenced to 25 years in prison.

II. PROCEDURAL BACKGROUND

A. State Appellate Court Proceedings

Carter appealed to the Illinois Appellate Court, raising, among others, the issue whether the trial court erroneously gave a combination of murder and voluntary manslaughter instructions that kept the jury from considering whether Carter had a mental state that would have precluded his conviction on the murder charge. The Illinois Appellate Court affirmed Carter's conviction on November 7, 1989

and denied his petition for rehearing on November 27, 1989.

Carter filed a petition for leave to appeal to the Illinois Supreme Court, raising the same issues. His petition for leave to appeal was denied on April 4, 1990.

B. Federal Court Proceedings

In April 1991, Carter filed a petition for a writ of habeas corpus in the district court pursuant to 28 U.S.C. § 2254. On July 10, 1992, the district court granted the writ, finding that the murder/voluntary manslaughter instructions violated due process. (App. 38). Relying on *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990),[3] *United States ex rel. Fleming v. Huch*, 924 F.2d 679 (7th Cir. 1991), and *Flowers v. Illinois Dep't of Corrections*, 962 F.2d 703 (7th Cir. 1992), the district court determined that the error resulting from the instructions could not be deemed harmless beyond a reasonable doubt. (App. 35). The district court reasoned:

> The trial court found sufficient evidence to instruct on voluntary manslaughter; therefore, it must have believed it rational for a jury to convict on that offense. We agree. The jury could well have reached that result if it believed in large measure the defendant's testimony and disbelieved the state's witnesses. And credibility determinations are the province of the jury.

(App. 37). The district court concluded that the instructions "so infected the trial as to violate due process." (App. 38). The district court denied the state's motion to alter the

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[3] In *Falconer*, the Seventh Circuit considered the defective murder/voluntary manslaughter instructions in the context of a habeas proceeding and concluded: "Explicit misdirection on this scale violates the constitutional guarantee of due process and demands a new trial or resentencing." 905 F.2d at 1137.

court's order on August 10, 1992, and the state filed a notice of appeal on August 18, 1992.

On September 23, 1994, the Seventh Circuit reversed the district court's order. Invoking the harmless error standard set forth in *Brecht v. Abrahamson*, ___ U.S. ___, 113 S. Ct. 1710 (1993), the court held that any error in the instructions did not have "a 'substantial and injurious effect or influence in determining the jury's verdict.' " (App. 15). The court acknowledged that its harmless error analysis involved credibility determinations. (App. 14). However, the court concluded (without elaboration):

> If in fact the jury did not credit Carter's testimony and decided that he did not have an unreasonable belief that the killing was justified in self-defense, the error had no effect on the verdict. Assuming, however, that the instruction caused the jury to believe that it could convict of murder even if Carter had such belief, or without considering whether he did, our review of the trial transcript satisfies us that the jury did not and would not have found that Carter had such belief.

(App. 15).

In dissent, Judge Ripple observed that applying the *Brecht* approach to the jury instructions at issue required the federal reviewing court to resolve matters of credibility and weigh the evidence on the issue of guilt. He found impermissible the reviewing court's substitution of its own judgment for the judgment of the state court jury. Judge Ripple declared: "Mr. Carter has a right to have his guilt or innocence determined by a jury, not by federal appellate judges." (App. 22).

Carter joined in a Petition for Rehearing and Suggestion for Rehearing in Banc which was denied on November 30, 1994.

REASONS IN FAVOR OF GRANTING THE WRIT

I. Introduction.

In *Brecht v. Abrahamson*, ___ U.S. ___, 113 S. Ct. 1710 (1993), the Court held that the standard to be used in determining whether habeas relief must be granted because of constitutional trial error is "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Id.* at 1722 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see also O'Neal v. McAninch*, No. 94-7407, 1995 WL 66598 (U.S. Feb. 21, 1995). In applying this standard, the habeas court must ascertain, in light of the record as a whole, whether the trial error resulted in actual prejudice. *Brecht*, ___ U.S. at ___, 113 S. Ct. at 1722.

However, the Court made clear that the *Brecht/Kotteakos* standard does not apply to all constitutional errors that might be raised in a habeas proceeding. The Court acknowledged, for example, that errors of a structural nature, such as deprivation of the right to counsel, so infect the entire trial process that harmless error analysis is impossible and automatic reversal is required. *Id.* at 1717. The Court also specifically stated that the *Brecht* standard might not apply in cases of a deliberate and especially egregious trial error, or one that is combined with a pattern of prosecutorial misconduct. *Id.* at 1722 n.9. Such an error, the Court said, "might so infect the integrity of the proceeding" that habeas relief would be appropriate even if the error did not substantially influence the jury's verdict. *Id.*[4]

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[4] Only days ago, in *O'Neal v. McAninch*, No. 94-7407, 1995 WL 66598 (U.S. Feb. 21, 1995), a case that also involved an in-

(continued...)

The instructional error at issue here is unlike the trial error to which *Brecht* harmless error analysis is meant to apply. Neither *Brecht* nor past decisions of this Court provides an appropriate framework for analyzing error from instructions that prevent a jury from making necessary findings. Attempts to apply *Brecht* to similar instructional errors are causing chaos in the Circuits, prompting conflicting decisions and strong dissents. Far from creating a coherent habeas standard, *Brecht* is resulting in a patchwork of *ad hoc* decisions based on appellate fact-finding. Because a different standard is necessary in cases of this kind, the Petition should be granted.

II. The Instructional Error Found Unconstitutional in *Falconer* Differs from the Trial Error at Issue in *Brecht*.

This case involves a form of error unlike the trial error at issue in *Brecht*. The *Brecht* harmless error standard is therefore unsuited to cases like this and seriously risks incorrect appellate decisions.

As this Court explained in *Brecht*, trial error "occurs during the presentation of the case to the jury, and is amenable to harmless-error analysis because it may be quantitatively assessed in the context of other evidence presented in order to determine the effect it had on the trial." *Brecht*, ___ U.S. ___, 113 S. Ct. at 1717 (quoting *Arizona v. Fulminante*,

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[4] (...continued)
structional error, this Court again noted the distinction between " 'mere technical errors' " as opposed to " 'important trial errors' " that "include any 'constitutional violation.' " *Id.* at *4 (quoting *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943), and *Brecht*, ___ U.S. at ___, 113 S. Ct. at 1723 n.1 (Stevens, J., concurring)) (discussing House Report on 28 U.S.C. § 391).

499 U.S. 279, 307-308 (1991) (internal quotations and ellipses omitted)). At issue in *Brecht* was whether the state's use of Brecht's post-*Miranda* silence, in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976), was harmless. The Court concluded that in light of the record as a whole, the state's references to Brecht's post-*Miranda* silence were infrequent and cumulative of other properly admitted evidence; the *Doyle* error therefore did not substantially influence the jury's verdict. *Brecht*, ___ U.S. at ___, 113 S. Ct. at 1722.

In *Gilmore v. Taylor*, ___ U.S. ___, 113 S. Ct. 2112 (1993), however, this Court recognized, without actually reaching the issue, that the very instructions given here, when read consecutively, permitted a juror to find the defendant guilty of murder, without considering whether the facts also established a lesser mental state that would have constituted a defense. In his dissent from the Seventh Circuit's decision in this case, Judge Ripple, noting this Court's acknowledgment that not all errors can be neatly classified as either "trial" or "structural," reasoned that an instructional error of this kind requires a different analysis than a trial error like the improper admission of evidence. (App. 21). He correctly concluded that, since the instructional error here deprives the jury of its fact-finding role, the error "cannot easily be neutralized because it is far closer to a 'structural' error than the typical trial-type error." (App. 21-22).

Because errors caused by unconstitutional jury instructions like those in this case are not "trial error" of the kind to which *Brecht* was intended to apply, this Court should grant this Petition to determine the appropriate harmless error standard for instructional errors that prevent the jury from considering constitutionally relevant evidence.

III. The Circuits Cannot Agree on an Appropriate Standard.

Efforts to apply *Brecht* to instructional errors of the kind in question here have generated conflicting holdings as well as vigorous dissents in other Circuits.

In *Suniga v. Bunnell*, 998 F.2d 664 (9th Cir. 1993), for example, the court declined to apply *Brecht* to a combination of instructions that allowed the jury to convict the defendant of murder, not only on a theory of murder based on malice aforethought, but also on a felony murder theory that did not even exist under state law. The court found the *Brecht* standard "redundant" in the case of an instructional error that has so infected the proceeding as to result in a denial of due process. *Id.* at 667. The court concluded that regardless of the weight of the evidence suggesting the defendant's guilt, harmless error analysis was inappropriate where even one juror's verdict might have been influenced by the defective instructions. *Id.* at 669-670.

In contrast, the court in *Libby v. Duval*, 19 F.3d 733 (1st Cir.), *cert. denied* ___ U.S. ___, 115 S. Ct. 314 (1994), determined that under *Arizona v. Fulminante*, 499 U.S. 279 (1991), an instruction that created a conclusive mandatory presumption of malice was indeed to be treated as trial error subject to the *Brecht* definition of harmless error. *Libby*, 19 F.3d at 738-739. The majority's decision in *Libby*, however, triggered a dissent from Judge Stahl, who, like Judge Ripple in this case, argued forcefully that the instruction at issue constituted "structural error." *Id.* at 742 (Stahl, J., dissenting). Judge Stahl went on to say that the "whole record" review dictated by *Brecht* "makes no sense where the error is not that the jury may have been swayed by tainted information, but rather is that the jury failed to consider relevant evidence and failed to make a required finding." *Id.* at 741 (Stahl, J., dissenting).

With growing numbers of conflicting decisions in the Circuits and increasing disputes even among judges within the same Circuit, the federal courts need this Court's guidance on whether *Brecht* applies to instructional errors. For this reason, as well, the Petition should be granted.

IV. The "Whole Record" Review Under *Brecht* is Unsuitable for Instructional Errors that Prevent the Jury from Considering Constitutionally Relevant Evidence.

The form of review *Brecht* requires is unworkable when the error in question involves defective jury instructions that keep the jury from considering constitutionally relevant evidence.

The harmless error analysis applied to the *Doyle* error in *Brecht* is perfectly suitable for trial errors such as the improper admission of evidence, because those errors are amenable to a quantitative assessment of the weight of the evidence. In cases where an error of that kind has occurred, the jury has presumably completed its fact-finding and addressed all the issues before it. A reviewing court, after excising that error from the record, can determine whether sufficient evidence remains to support the jury's finding.

The *Brecht* harmless error analysis may even be appropriate for certain types of instructional errors. For instance, an instruction erroneously creating a rebuttable presumption of malice in murder cases may be harmless where the record reveals that the facts at trial conclusively established malice. *See, e.g., Rose v. Clark*, 478 U.S. 570, 580-581 (1986).

However, instructions that prevent the jury from considering constitutionally relevant evidence, such as evidence that could establish a defense to murder, render the entire

verdict suspect. Where there is at least some evidence to support a finding of a defense, it is impossible using *Brecht* to determine whether the jury either did not find facts supporting the defense or did not reach the issue at all. In cases of that type, the *Brecht* harmless error analysis is useless. No quantitative assessment of the weight of the remaining evidence is meaningful or even available.

Because there is no way of knowing why the jury convicted the defendant of murder and whether the jury even reached his defenses to the murder charge, a later determination by a reviewing court that the evidence would regardless have been sufficient to support a murder conviction effectively usurps the function of the jury. This Court has long recognized the dangers in permitting a judge, or group of judges, to invade the jury's fact-finding role. It is well settled, for example, that regardless of how overwhelming the evidence, a trial judge may not direct a verdict of guilt, because doing so violates the defendant's right to a trial by jury. *Rose*, 478 U.S. at 578. "Where that right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty." *Id.*

Those dangers are enhanced where an instruction prevents the jury from considering constitutionally relevant evidence. When that has occurred, a reviewing court's opinion finding the evidence sufficient to support guilt is "simply irrelevant":

> To allow a reviewing court to perform the jury's function of evaluating the evidence of intent, when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made.

Connecticut v. Johnson, 460 U.S. 73, 86 (1983). The inquiry is not "whether guilt may be spelt out of a record," but whether guilt has been properly found by a jury; where a jury's findings are deficient due to an instructional error, findings made by a judge cannot cure the deficiency. *Carella v. California*, 491 U.S. 263, 269 (1989) (Scalia, J., concurring) (quoting *Bollenbach v. United States*, 326 U.S. 607, 614 (1946)).

Only last week, in *O'Neal v. McAninch*, No. 94-7407, 1995 WL 66598 (U.S. Feb. 21, 1995), this Court disapproved the very sort of appellate fact-finding that occurred in this case. The Court held: "When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And the petitioner must win." *Id.* at *3. Mirroring the reasoning of the district court in this case, the Court declared that a habeas petition must be granted as long as the habeas court is forced to answer the question whether the error had a substantial effect on the jury's verdict with: " 'It is extremely difficult to say.' " *Id.* at *6. Any other result would require the court to substitute itself for the jury.

It seems highly unlikely that this Court would ever classify as "trial error" a court's ruling that an accused could have a jury trial only as to the crimes charged but had to try his defenses to the bench. Yet, what happened here was even more egregious. The instructions found unconstitutional in *Falconer* deprived Carter of his right to a jury trial on his defense to the murder charge altogether. The Seventh Circuit's subsequent decision that the jury would not have found the facts supporting that defense, although it was utterly impossible to know whether the jury had even considered it, amounted to an after-the-fact

deprivation of the right to a jury trial.[5] That court's facile and mechanical application of *Brecht* to the indisputably unconstitutional jury instructions here not only permits but encourages federal judges to supplement or even replace the jury's findings with their own in violation of the Sixth Amendment.

This Court urgently needs to establish the appropriate standard and analysis to be applied in a habeas proceeding arising from instructional error that prevents a jury from completing its fact-finding and determining whether a defendant has a defense to the crime charged. Accordingly, Carter asks that the Court grant this Petition.

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[5] In effect, Carter never received a trial on his defense to the murder charge until his habeas petition reached the Seventh Circuit.

CONCLUSION

For the foregoing reasons, petitioner Adolph Carter respectfully requests that the Court grant his Petition for a Writ of Certiorari.[6]

Respectfully submitted,

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[6] Alternatively, Carter asks that the Court grant this Petition, vacate the decision of the Seventh Circuit, and remand this case in light of *O'Neal v. McAninch*, No. 94-7407, 1995 WL 66598 (U.S. Feb. 21, 1995).